Supreme Court, U.S.
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No. 98-818

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that allowing only the beneficiaries of trust obligations to select the trustees bound to meet those obligations does not violate the Fourteenth or Fifteenth Amendment, when the validity of the underlying trust obligations is unchallenged and the obligations are based on the congressionally recognized status of the beneficiaries as an indigenous people, who – like American Indians and Alaska Natives – were once-sovereign, have claims to aboriginal lands taken by the Federal Government, and occupy a long-standing special trust relationship with the United States?

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INTRODUCTION AND INTEREST OF AMICI

This case presents issues of unique importance to the amici States, most of which entered the Union under admission or statehood acts that imposed various requirements as conditions of statehood, and Pacific Island territories and Commonwealths that support the resolution of Native Hawaiian issues. Amici support their sister State of Hawaii as this Court reviews the constitutional consequences of state action taken pursuant to trust responsibilities assumed by Hawaii for the native people of Hawaii. Initially, Hawaii, as a condition of its statehood, assumed a trust obligation which includes among its purposes "the betterment" of "native Hawaiians" who were of "not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778." To further that purpose and (following Congress' lead in post-1959 enactments) extend it to *all* descendants of native Hawaiians, Hawaii amended its constitution in 1978 to create the Office of Hawaiian Affairs ("OHA"). That office is charged with implementing the trust responsibility to benefit and support all Hawaiians (now defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii"). The OHA's trustees manage revenues that support the agency's various cultural, economic development and educational programs targeted to "native Hawaiians" and "Hawaiians," and only persons who fall into one of those classifications may vote in statewide elections to pick OHA's trustees.

Petitioner presents a Fourteenth and Fifteenth Amendment challenge to the state constitutional and legislative scheme established by Hawaii in furtherance of

its trust obligation, while leaving the obligation itself unchallenged. In his claim that the Hawaii voting scheme runs afoul of the Equal Protection Clause of the Fourteenth Amendment, petitioner asserts that native Hawaiians do not enjoy the same "special relationship" that exists between the United States and Indian tribes, a relationship recognized in *Morton v. Mancari*, 417 U.S. 535 (1974). Under that "special relationship," legislation that favorably treats Indians may be upheld as a political classification, not an impermissible racial classification. While a State may not legislate contrary to federal law or treaties entered into by the federal government, it may enact legislation that furthers the "special relationship," particularly when the federal government has delegated federal responsibilities to the State or has ratified state initiatives, as happened with Hawaii in the creation of OHA. While the underlying trust obligation in this case was unchallenged, petitioner's current challenge appears to require a resolution of the Equal Protection claim under the Fourteenth Amendment. This brief is confined to that question, as it relates most closely to a state's assumption of delegated responsibilities under federal law relating to native or indigenous people. Amici States believe this Court should apply principles from *Morton v. Mancari*, 417 U.S. 535 (1974), to uphold Hawaii's initiatives, as the state's actions are "tied rationally to the fulfillment of Congress' unique obligation[s]" to indigenous people, in this case to all Native Hawaiians,[1] much like Indians in *Mancari*. 417 U.S. at 555.

[1] This brief follows the current federal usage of the term "Native Hawaiian" to refer to *any* "descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in . . . Hawaii," *e.g.*, 16 U.S.C. § 470w(17), regardless of blood quantum. The term "native Hawaiian," with the lower case "n," is used to refer to the more restrictive definition found in the Hawaiian Homes Commission Act of 1920 (HHCA), 42 Stat. 108, which has a fifty percent blood quantum requirement. Under state law, "Hawaiian" means *any* descendant of the aboriginal people. Haw. Rev. Stat. § 10-2. To avoid confusion, this brief occasionally uses the term "Hawaiian people" as synonymous with "Native Hawaiian" (or "Hawaiian"), the broader definition followed in most federal statutes.

SUMMARY OF ARGUMENT

In Hawaii's Admission Act, Congress delegated authority to the new State of Hawaii to further a federal statutory trust responsibility to its indigenous people. Initially, this responsibility was to hold certain lands as a "public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians . . . in such a manner as the constitution and the laws of the . . . State may provide." This unique delegation of authority for a state to maintain a public trust for a specific class of indigenous people was a proper exercise of congressional power. Statehood is a compact between the sovereign people joining the Union and the Union itself. Congress may set as conditions of statehood requirements that further various federal or national purposes. Congress specifically required Hawaii to observe and administer a federal trust responsibility to those "native Hawaiians" with a fifty percent blood quantum level.

While this delegation of authority to Hawaii related to the more limited category of "native Hawaiians," subsequent acts of Congress clarified that the federal

relationship went to all "Native Hawaiians," including all descendants of the indigenous Hawaiian people. Amici States submit the Admission Act and the subsequent legislation reflect a pre-existing "special relationship" between the federal government and all Hawaiians, a relationship which permits special treatment of the indigenous group without violating the Due Process and Equal Protection provisions of the Constitution. This is because the special relationship is based on a political, not an impermissible racial classification. The States submit Hawaii has acted constitutionally to fulfill the trust responsibilities given to it by the federal government. The subsequent federal legislation re-affirms (1) the authority of Congress to legislate in matters affecting aboriginal or indigenous peoples of the United States, including the native peoples of Alaska and Hawaii; and (2) that a unique trust relationship, akin to that between the United States and Indians and Native Alaskans, exists between the United States and all Native Hawaiians.

Amici States submit the federal government's special relationship is rooted, not in racial characteristics, but in the unique history of Hawaii and in Hawaiian's cultural and religious customs, beliefs, practices and language. Petitioner relies on the formal "tribal" classification in the relationship between the United States and Indian tribes as dispositive of the question whether such a relationship can exist for Native Hawaiians. Contrary to his claim, however, "tribal" membership is not the essential qualification for the special relationship Congress has extended to aboriginal and indigenous peoples. Additionally, Hawaiians had a uniquely developed society with a monarch, chiefs and sub-chiefs, laws and practices

that constituted full nationhood, which was destroyed when the Kingdom of Hawaii was overthrown with the complicity of the United States. Amici States submit the Court should defer to Congress' special expertise in handling the affairs of this Nation's aboriginal and indigenous people. Congress is in the best position to determine when a special relationship exists, based on unique qualities and circumstances relating to the indigenous group.

In addition to the express delegation to Hawaii to administer a trust for native peoples, Congress effectively ratified Hawaii's own actions taken to further the federal trust relationship. In its 1978 constitutional amendments, Hawaii provided, *inter alia*, an Office of Hawaiian Affairs ("OHA") to hold title to certain property in trust for Native Hawaiians, regardless of blood quantum. Hawaii did this to bring the state "in line" with the post-1959 federal legislation that recognized a trust obligation to *all* Native Hawaiians. In turn, Congress ratified OHA's activity by appropriating funds to it, delegating authority to it and requiring consultation with OHA. This congressional ratification of OHA serves as an implied delegation of authority to OHA to act as trustee for its broadly defined set of beneficiaries, *all* Native Hawaiians.

Amici States also believe Hawaii may voluntarily assume responsibilities to further the federal trust responsibility. As States come into the Union as sovereigns, they retain the power to act in this area provided their actions are not preempted by federal legislation or by implication. In Hawaii's case, Congress has gone so far as to ratify OHA's actions. Thus, it does not appear that OHA is acting contrary to existing federal law; indeed, its

actions further the trust relationship. As against constitutional challenges, this Court has upheld legislation that is "rationally tied to the fulfillment of Congress' unique obligation[s]" to Indians. The same rule should apply with respect to actions taken by Hawaii to support and protect Native Hawaiians. Here, OHA's objectives are designed and carried out precisely as Congress has suggested.

Finally, there is no merit in petitioner's claim that OHA and its trustee election laws violate this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Under *Adarand* and *Croson*, all "racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, at 227. Amici States submit that OHA and the trustee elections are actions taken to fulfill the purposes of the federally-created and -ratified trust and are not racial classifications of the type prohibited by *Adarand* and *Croson*. Given the "special relationship" between the federal government, which mandated and expanded the trust relationship, and the Native Hawaiians, the proper management of the trust obligation requires actions that benefit the class of persons designated as the beneficiary – all Native Hawaiians. That class is not a racial one, but a more complex classification that recognizes the unique historical circumstances relating to an aboriginal and indigenous people, who were deprived of their land and sovereignty. As Hawaii's initiatives are "rationally tied to the fulfillment of Congress' unique obligation[s]" to Native Hawaiians,

this Court should uphold Hawaii's initiatives as constitutional.

I. CONGRESS, THROUGH HAWAII'S ADMISSION ACT, NUMEROUS SUBSEQUENT ACTS, AND RATIFICATION OF HAWAII'S LEGISLATION, HAS PROPERLY DELEGATED AUTHORITY TO THE STATE OF HAWAII TO FURTHER A FEDERAL TRUST RESPONSIBILITY TO ALL HAWAIIAN NATIVES

The critical starting point for understanding the unique authority Hawaii has undertaken to protect and further the interests of Native Hawaiians is the action taken by the Congress in admitting Hawaii into the Union. Hawaii was admitted as a State in 1959 by way of the Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959). Under section 5(f) of that Act, Congress conveyed to Hawaii certain lands with the condition that Hawaii hold these lands (and the proceeds of the lands) as a "public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians . . . in such a manner as the constitution and the laws of the . . . State may provide." *Id.*, § 5(f). This delegation of authority for a state to maintain a public trust for a specific class of indigenous people and to legislate in furtherance of its purposes is unique among admission acts for States of the Union. Many admission acts, such as that for the State of Alaska, include "disclaimers" by the prospective state and its people of "all right and title to . . . any lands or other property" held by Indians or Indian tribes (or Alaskan Natives). *See, e.g.*, Act of July 7, 1958, § 4, 72 Stat. 339 (Alaska Statehood Act). Similarly, many acts, such as the Enabling Act under

which Washington, Montana, North Dakota and South Dakota entered the Union, required that the people of those prospective states acknowledge that Indian and tribal lands were to remain "under the absolute jurisdiction and control of" Congress until Indian title was extinguished. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 67-70 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 57-58 (1962). Except for Hawaii's Admission Act, amici States know of no other congressional measure that conveyed to the prospective state, as a condition of statehood, federal lands to be held as part of a public trust for that state's native or indigenous people.

It is undisputed that this delegation in the Admission Act was proper. First, Congress early on recognized a special relationship between the United States and the Hawaiian people, comparable to that between the federal government and American Indians and Alaskan Natives. *See* Hawaiian Homes Commission Act, 1920 § 201, 42 Stat. 108 (1921). Second, Congress may set as conditions of statehood requirements that further various federal or national purposes, as long as they meet constitutional muster and do not offend the principles of federalism. *See Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Certainly, the cessions and disclaimers of interest in Indian lands required in the post-1850 statehood acts advanced the national goal of protecting Indian interests. However unpopular these conditions may have been locally, the citizens of the prospective states, acting in their sovereign capacity, were willing to agree to them while guaranteeing in their admission to the Union the preservation of their sovereignty, the general police powers of statehood

and the general protection of the federal government.[2] These conditions did not implicate any constitutional concerns at the time, nor should they now. The disclaimer requirements neither imposed nor established an impermissible racial classification under the Fifth or Fourteenth Amendment. Indeed, the conditions of statehood served as restrictions only on the prospective states' interest in lands (or fishing rights) belonging to Indians and Indian tribes; they required "disclaimer[s] of proprietary rather than governmental interest[s]." *Organized Village of Kake v. Egan*, 369 U.S. at 69.

So it was also with Hawaii that Congress required, as a condition of statehood, Hawaii's assent to assuming a

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[2] As the Eleventh Circuit expressed it in *United States v. Sanchez*, 992 F.2d 1143 (1993):

> "Congress must have, at some instant, relinquished its authority over territorial lands so that the people of those lands could approach the United States as an independent entity seeking admission to the Union. The process of statehood was, then, one by which a sovereign entity made a compact with the Union to submit to the (then limited) authority of the federal government in exchange for the benefits offered in Article IV Section IV of the Constitution: that 'the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.' The language of the Tenth Amendment, reserving 'powers not delegated to the United States' to new and existing states and to the people, acknowledges the reservoir of state sovereignty which permitted the formation of a federal union." *Sanchez* at 1149, n.4.

trust obligation with certain lands conveyed to it for, *inter alia*, the betterment of native Hawaiians. *Keaukaha-Panewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984). As the conditional conveyance of these certain lands was from sovereign to sovereign, Congress, in the Admission Act, did not deny any person of property without due process of law, in violation of the Fifth Amendment. As will be seen, the Congress has clarified that the underlying special relationship goes to all Native Hawaiians, not just those identified in the Admission Act.

A. As a Federal Statutory Matter, All Native Hawaiians Enjoy the Same Special Relationship With the Federal Government as Indians and Native Alaskans

As discussed, native Hawaiians, as a class of persons, are the beneficiaries of a public trust created by federal statutory law in Hawaii's Admission Act. While the state administers the trust, the trust relationship arises from a federally-created obligation, one that reflects a "special relationship" between the Hawaiian people and the federal government. There is no question but that this trust relationship is principally a *federal* one,[3] notwithstanding

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[3] If the state uses the trust (or its proceeds) for any purpose other than those enumerated in the Admission Act, it "shall constitute a breach of trust for which suit may be brought *by the United States*." Pub. L. 86-3, § 5(f) (emphasis added). As trust beneficiaries, native Hawaiians may also sue in *federal* court to remedy breaches of trust, *Keaukaha-Panewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d at 1472, as the "trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law." *Id.*

that Congress both expressly (in the Admission Act) and impliedly (in subsequent acts) has delegated authority to Hawaii to carry it out. While petitioner argues that the Hawaiian people cannot be the subject of special treatment as a class of persons on the basis of their racial background, he does not challenge the federally-created public trust in this case. However, in his petition to this Court, he impliedly attacks the trust as allowing an impermissible racial classification, arguing that no "special relationship"exists between the Native Hawaiians and the State of Hawaii or the federal government. (Pet. 19-20, 39-45.) His argument ignores considerable federal statutory law on the subject, statutes that "reaffirmed the trust relationship which existed between the United States and the Hawaiian people." Native Hawaiian Education Act, Pub. L. 89-10, Title IX, § 9201(9), codified at 20 U.S.C. § 7902(9) (1994). Amici States believe the trust flows from and expresses a pre-existing "special relationship" between the federal government and Native Hawaiians and that Hawaii has acted constitutionally to fulfill the trust responsibilities given to it by the federal government in the Admission Act and subsequent acts.

Over time Congress has placed all Native Hawaiians in a special class for several significant purposes. Pre-statehood, Congress set aside 200,000 acres of public trust lands for long-term leases to "native Hawaiians," limiting the term as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act, 1920, § 201(7). While limited to Hawaiians of fifty percent blood quantum, Congress established thereby a fiduciary

trust obligation in the Hawaiian Homes Commission benefitting some number of the Hawaiian people as an aboriginal or indigenous people. Still pre-statehood, Congress in 1938, "acknowledged the unique status of the Hawaiian people" by providing for leases of certain federal lands for use and fishing " 'only by native Hawaiian residents . . . and visitors under their guidance.' " *See* 20 U.S.C. § 7902(9). As discussed above, the Admission Act required Hawaii to adopt the Hawaiian Homes Commission Act and administer the public lands trust, "but [Congress] *reaffirmed the trust relationship which existed between the United States and the Hawaiian people* by retaining the exclusive power to enforce the trust . . . " *Id.* (emphasis added). Congress also noted in the Native Hawaiian Education Act that it had earlier ceded to Hawaii certain lands "to be held by the State 'in public trust' and [Congress] *reaffirmed the special relationship which existed between the United States and the Hawaiian people* . . . " 20 U.S.C. § 7902(11) (emphasis added). As chronicled by the Brief of Hawaii and several amici, numerous acts of Congress subsequent to admission regularly recite and reaffirm the special relationship of the federal government with the Hawaiian people. As set forth there, in many of those federal statutes, Congress has extended special educational, health and other benefits to *all* Native Hawaiians.

There are two critically important consequences of Congress' subsequent actions in this field: first, it has made clear that *all* Hawaiian people, not just those with the fifty percent blood quantum, enjoy the special relationship with the federal government; and second, it has

made clear it exercises its authority in this field concomitant with its exercise of authority in Indian (and Native Alaskan) affairs. In acts such as the Native Hawaiian Education Act, 20 U.S.C. § 7902, Congress has declared the broad basis of its relationship with the broader class of Native Hawaiians to which the federal obligations flow:

> In recognition of the special relationship which exists between the United States and the Native Hawaiian people, the Congress has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo and Aleut communities under the Native American Programs Act of 1974 [42 U.S.C.A. § 2991 et seq.], the American Indian Religious Freedom Act [42 U.S.C.A. § 1996], the National Museum of the American Indian Act [20 U.S.C.A. § 80q et seq.], the Native American Graves Protection and Repatriation Act [25 U.S.C.A. § 3001 et seq.], and the Native American Languages Act [25 U.S.C.A. § 2901 et seq.].

20 U.S.C. § 7902(13) (emphasis added.). Recitation of a "trust relationship" and "historical and unique legal relationship" between the United States and all Native Hawaiians is repeated, recognized and reaffirmed in the Native Hawaiian Health Care Act, 42 U.S.C. § 11701. Leaving no question where it stands, Congress has declared the following:

> The authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate

> in matters affecting the native peoples of Alaska and Hawaii.

42 U.S.C. § 11701(17). Congress thus has declared all Native Hawaiians, like Indians and Native Alaskans, are possessed of a special relationship with the United States because of their history, culture, and the eventual cession of land and sovereignty.

B. The Federal Government's Special Relationship with the Hawaiian People Is Rooted in the Unique History of Hawaii and in Hawaiians' Cultural and Religious Customs, Beliefs, Practices and Language, Not in Racial Characteristics

Petitioner seeks to convince this Court that the rule in *Morton v. Mancari, supra*, 417 U.S. 535, is inapplicable to Native Hawaiians, where *Mancari* found the Indian preference in that case was a political, not a racial classification. He believes the *Mancari* Court found the classification was political because it relied on the formal tribal affiliation of Indians, i.e., "the preference at issue in *Mancari* was subject to rational basis review only because it applied 'to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.' " Pet. 18, quoting *Mancari*, 417 U.S. at 554. Petitioner gets it only half right, undercutting his argument that *Mancari* is inapplicable to congressional action relating to the Hawaiian people.

It is true the *Mancari* Court relied upon the tribal affiliation of Indians who were the subjects of an employment preference within the Bureau of Indian Affairs

("BIA"). However, the Court explained the lower standard of scrutiny applied solely because the preference operated as an "employment criterion reasonably designed to further the cause of self-government and to make the BIA more responsive to the needs of its constituent groups." *Mancari*, 417 U.S. at 553-554. The Court continued: "[h]ere, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." *Id.* In other words, it is the fact that the employment preference was in the BIA, the agency which "governs" the lives and activities of this "group of people," which was determinative of the Court's conclusion. The positions in the BIA subject to the preference involve the administration of "functions or services affecting any Indian *tribe*." *Id.*, at 537-38 (emphasis added). The "nonracially based" goals of the BIA employment preference were designed to further the cause of tribal self-government; indeed, it is because the employment positions concerned functions and activities that related only to *tribal governance* that tribal members were the subject of the preference.

The special treatment of Native Hawaiians under the trusts established for their benefit is akin to the preferential treatment in *Mancari*, grounded in the status of a preexisting aboriginal and sovereign people. There is no need to require that Native Hawaiians be affiliated in "tribes" or be registered as members of "tribal governments" in order for them to enjoy a special relationship with the federal government. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83 (1977). Certainly, this case does not turn on the fact that Native Hawaiians do

not have a "tribal" style self-governing apparatus directly comparable to Indian tribes. What cannot be ignored is that Americans deprived them of self-governance in occupying Hawaii, transforming its government, and eventually toppling its last monarch. Native Hawaiians, like Indians and Native Alaskans, are the aboriginal and indigenous people of "conquered" lands, whose unique political and cultural history justifies legislative measures that recognize, and, in many cases, benefit them apart from all others in the United States. *United States v. Kagama*, 118 U.S. 375, 384-385 (1886).

In light of the unique history of Hawaii and repeated congressional declarations of a special relationship between the federal government and all Native Hawaiians, it is appropriate to say that the trusts established by Congress flowed from the prior sovereign status of aboriginal Hawaiians. The special relationship thus derives from inherently political, not racial, considerations. That conclusion is exemplified strikingly by the congressional recognition that the

> Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language and social institutions.

42 U.S.C. § 11701(2). This sounds little different than the foundation of American Indian or Native Alaskan identities; it is built principally of political, cultural, and social elements, not racial ones. That there is *some* recognition of "blood quantum" or ancestral descent is not fatal to Indian legislation. *See* 25 U.S.C. § 479 (the term "Indian"

includes "all other persons of one-half or more Indian blood".); *see also Morton v. Mancari*, 417 U.S. at 555, n. 24 (policy requires individual to be "one-fourth or more degree Indian blood . . . "). Nor should it be with legislation affecting the Hawaiian people.[4] The principal classification of Native Hawaiians is as an aboriginal people, a classification founded in history, conquest, deprivation of land and a unique culture and language. It is unavoidable that an aboriginal people identify themselves to some extent by ancestry and descent; but that is not what makes them the subject of the special relationship. As with Indians and Native Alaskans, it is their status as aboriginal people that forms the foundation of the relationship.

This Court should defer to Congress' special expertise in handling the affairs of aboriginal and indigenous people found throughout the United States. Congress, not the courts, is in the best position to ascertain the appropriate level of identification and connection between a people so as to constitute a special class and enjoy the special relationship – whether that be by descendency, legal and political circumstances or language and culture. Much as Congress has significant constitutional power to determine what constitutes a tribal or aboriginal group, *United States v. Candelaria*, 271 U.S. 432, 439-41 (1926), *United States v. Sandoval*, 231 U.S. 28, 46 (1913), *United States v. McGowan*, 302 U.S. 535, 539 (1938), the Court

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[4] It should be noted that the voting restriction in this case imposes no blood quantum requirement; one need only be a descendant of the aboriginal people. Haw. Const., Art XII, § 5; Haw. Rev. Stat. § 10-2.

should look to Congress to determine the appropriate criteria that qualify a people as aboriginal or indigenous. *See also United States v. John*, 437 U.S. 634 (1978). Its expertise and judgment is particularly relevant to the Hawaiian experience, as the United States has acknowledged complicity in overthrowing the Kingdom of Hawaii and taking territory and power from its sovereign citizens, including the aboriginal people of that Kingdom. *See* Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993).

C. Congress Has Ratified Hawaii's Own Acts Furthering the Trust Responsibility

Not only has Congress expressly delegated authority to Hawaii to administer the trust responsibility to native Hawaiians, as found in the Admission Act, Congress has also moved to ratify Hawaii's own actions taken to further the purposes of the federal trust responsibility to all Hawaiian people.

In 1978, Hawaii, through its Constitutional Convention, amended its constitution, accomplishing two objectives relating to the Hawaiian people. One amendment affirmed that the State holds ceded lands as a public land trust for "native" Hawaiians (as defined in the Hawaiian Homes Commission Act) and the general public. Another amendment established the Office of Hawaiian Affairs (OHA) to hold title to "all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians.

There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians."[5] Hawaii Constitution, art. XII, sec. 5. The application of the trust to "Native Hawaiians," or "Hawaiians," was to bring the state "in line with the current policy of the federal government to extend benefits to all Hawaiians regardless of blood quantum." Proceedings of the Constitutional Convention of Hawaii of 1978, Vol. 1 Journal and Documents (Hawaiian Affairs Committee), p. 647. Hawaii, thus, acted in 1978 to conform its understanding of the federal trust responsibility by extending its obligations to *all* Native Hawaiians under OHA's guardianship. While OHA is careful to ensure that funds derived from § 5(f) lands go only to programs that benefit the more limited group of "native Hawaiians," other funds raised or collected by OHA are used to benefit the broader group of "Native Hawaiians," the subject of the federal statutory trust responsibility.

In turn, Congress has since expressly ratified OHA's activity in several statutes as set forth in the appendix of the Brief of Amicus Office of Hawaiian Affairs, et al. These statutes appropriate federal funds to OHA, delegate authority to OHA and require consultation with OHA. In appropriating for benefits and loan programs for Native Hawaiians, Congress has accommodated to OHA's programs and procedures. This congressional ratification of OHA undoubtedly serves as an implied delegation of authority to OHA to act as trustee for its broadly defined set of beneficiaries, namely, *all* Native

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[5] For the meaning of the term "Hawaiian" under state law, see n.1.

Hawaiians. In short, Hawaii acted to bring itself "in line" with federal policy extending benefits to all Hawaiians regardless of blood quantum, and Congress, in turn, ratified Hawaii's actions conforming to the congressional understanding of the federal trust responsibility to all Native Hawaiians. This Court should recognize the profoundly consonant nature of these federal and state actions, affirm the delegations implicit in them, and uphold Hawaii's constitutional and legislative measures as fulfilling legitimate constitutional federal objectives.

D. Hawaii May Voluntarily Assume Responsibilities to Further the Federal Trust Relationship.

Finally, amici States believe Hawaii may assume responsibilities on its own in this field. A State should be able to provide for special treatment to its aboriginal people provided its actions are not preempted by federal legislation or implication and they are "rationally tied to the fulfillment of Congress' unique obligation[s]" to native peoples. *Mancari*, 417 U.S. at 555. When the States entered into the Union, they did so with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Implicit in that sovereignty is the power of a state to act on its own in an area of federal responsibility where not preempted. While the power of the federal government in Indian affairs under the Constitution, Article I, section 8, clause 3 (Indian Commerce Clause), is "plenary," *see Alaska v. Native Village of Venetie Tribal Gov't.*, 522 U.S. 520, 531, n. 6 (1998), nothing suggests the power is exclusive. Indeed, this Court stated:

> The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), citing *Organized Village of Kake*, 369 U.S. at 75; *Williams v. Lee*, 358 U.S. 217 (1959); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946); and *Draper v. United States*, 164 U.S. 240 (1896). In *New York ex rel. Cutler v. Dibble*, 62 U.S. (How.) 366 (1859), this Court upheld the state's law *protecting* Indians, noting it was not contrary to a federal treaty with the tribe or any other federal law.

This Court should re-affirm the principle that states may enact laws or take actions that further the federal responsibilities where such laws or actions are not in conflict with federal law. As such, state action does not offend federal plenary power and effects good public policy.

Where such state actions are "rationally tied to the fulfillment of Congress' unique obligation[s]" to native people, *Mancari*, 417 U.S. at 555, they do not run afoul of the Equal Protection Clause of the Fourteenth Amendment, much as similar federal action does not deprive any individual of due process under the Fifth Amendment. *See McClananhan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177 (1973). As noted in the appendix to the Brief of the Amicus Hawaii Congressional Delegation, numerous states voluntarily assume certain limited obligations to

benefit Indians within their state; such laws and programs should be seen as furthering the special relationship between the federal government and Indians.

Hawaii's actions in amending its Constitution to provide for the OHA and its programs to benefit all Native Hawaiians are not contrary to any federal statutory law relating to Native Hawaiians or to the federal trust responsibility. In fact, the state constitutional provisions and laws further the federal trust responsibility, as Congress repeatedly has acknowledged in legislation, appropriations and statutory ratifications of OHA and its charge.

II. HAWAIIAN LAWS SUSTAINING NATIVE HAWAIIANS, LIKE FEDERAL LAW PROTECTING AMERICAN INDIANS AND NATIVE ALASKANS, DO NOT VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT

Petitioner contends that this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), require invalidation of the trustee election laws for OHA, as a race-based scheme. In *Adarand*, this Court ruled that "[A]ll racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, at 227; *also Croson*, 488 U.S. at 496-97; *Shaw v. Reno*, 509 U.S. 630, 644 (1993). Further, this Court has ruled that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, at 227.

Amici States submit that the OHA trustee elections, and the actions taken by Hawaii to further the purposes of the federally-created and -ratified trust, are not racial classifications of the type prohibited by *Adarand* and *Croson*. Given the "special relationship" between the federal government, which mandated and expanded a trust relationship, and the Native Hawaiians, the proper management of the trust obligation requires actions that benefit the class of persons designated as the beneficiary – all Native Hawaiians. That class, as discussed above, is not a racial one, but a more complex classification that recognizes the unique historical circumstances relating to an aboriginal and indigenous people, who were deprived of their land and sovereignty. More akin to *Mancari*, the trustee election scheme is designed to be "more responsive to the needs of its constituent group[ ]." *Mancari*, 417 U.S. at 554. The restriction on the electorate in the OHA trustee elections serves a nonracially based goal – that of confining trust matters to those, who, like the BIA employees in *Mancari*, are most concerned with the activities and functions of the trust. Given the special relationship of all Native Hawaiians to the federal government and the federally-created trust relationship under federal statutory law, the trustee election scheme should be analyzed under the standard in *Mancari*, not *Adarand* – i.e., whether it is "tied rationally to the fulfillment of Congress' unique obligation[s]," in this case to Native Hawaiians, much like Indians in *Mancari*. 417 U.S. at 555. Here, the trustee election scheme definitely is tied to fulfilling Congress' unique obligation – one that runs to *all* Native Hawaiians – as it provides for Hawaiians to elect the trustees of a trust established for their own

betterment. This Court should adopt the *Mancari* standard as to all that flows from the trust for all Native Hawaiians and affirm the decision below.

CONCLUSION

For the reasons stated here, the judgment of the Court of Appeals should be affirmed on the issues presented.

Respectfully submitted,

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